In the Supreme Court
OF THE
United States

OCTOBER TERM, 1925

No. 189

E. B. ENGEL, *Petitioner,*

vs.

J. O. DAVENPORT, et al., *Respondents.*

BRIEF FOR PETITIONER.

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I.

STATEMENT OF FACTS.

Petitioner, a seaman, was injured on an American merchant vessel engaged in interstate commerce on the 30th day of April, 1921. Twenty-one months and eighteen days, thereafter, he filed his complaint in the Superior Court of the State of California, in and for the City and County of San Francisco, praying damages for such injuries, the complaint alleging that he was injured by reason of the breaking of a defective pelican hook.

The said Superior Court, sustained a demurrer to his complaint without leave to amend, and upon appeal to the Supreme Court of the State of California, the court of last resort in the state, two questions were presented, as follows:

1st. Whether a state court had jurisdiction over the action.

2nd. Whether the state statute of limitations of one year, or the time given by Section 6, of the Act of Congress of April 22, 1908, 35 Stat. 65, as amended by the Act of April 5, 1910, 36 Stat. 291, which reads:

> "Sec. 6. That no action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued.
>
> Under this Act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several states, and no cause arising under this Act and brought in any state court of competent jurisdiction shall be removed to any court of the United States."

applied to petitioner's case.

The said State Supreme Court first decided that it did not have jurisdiction over the cause of action, but was silent on the statute of limitations applicable.

But, on a petition for a rehearing which was granted, its final decision was, that a state court had jurisdiction over the cause of action, but that the state statute of limitations of one year, it reading,

Sub. 3, Sec. 340, of the Code of Civil Procedure of the State of California, as follows:

> "340. Within one year. * * *
>
> 3. An action for libel, slander, assault, battery, false imprisonment, seduction or for injury to or for the death of one caused by the wrongful act or neglect of another or by a depositor against a bank for the payment of a forged check,"

applied. (Tr. pp. 10, 11.)

Engel v. Davenport, 194 Cal. 244, 350, 351, 352.

Petitioner, thereupon petitioned this court for a writ of certiorari to the said Supreme Court of the State of California, asserting that he had been denied a right given to him by a statute of the United States, to-wit, that of bringing his action within two years from the date of the injury, and the court granted the writ, and the case is now before this court for hearing on the merits.

II.

ASSIGNMENT OF ERRORS.

The assignment of errors is found on pages 12 and 13 of the transcript, and read:

> "That the said Supreme Court of the State of California, erred in its proceedings, and its decision and judgment, in the above entitled cause, in the following particulars:
>
> 1. In finding and deciding that the statute of limitations contained in Section 6 of the Act of Congress of April 5th, 1910, 36 Stat. 291, reading in part:
>
> 'Section 6. That no action shall be maintained under this act unless commenced within two years

from the day the cause of action accrued,' did not apply to plaintiff and appellant's cause of action.

2. That the said Supreme Court of the State of California, erred in finding and deciding that the statute of limitations of the State of California, applied to plaintiff and appellant's cause of action.

3. That the said Supreme Court of the State of California, erred in not finding and deciding that the Workmen's Compensation Laws of the State of California, did not apply to plaintiff and appellant's cause of action."

III.

ARGUMENT.

CONGRESS INCORPORATED THE WHOLE OF THE ACT OF APRIL 22, 1908, AS AMENDED BY THE ACT OF APRIL 5, 1910, IN SECTION 33, OF THE JONES ACT.

Of course, where the language of any part of the Railway Employers Liability Act is clearly only applicable to railway employees, that of itself would fall by its own expression, but as to the rest of the act, there can be no uncertainty about what Congress did. It intended to, and it did, place seamen in exactly the same position as railway employees, excepting only that it did limit the place of trial, the venue of the action, to the residence of the defendant, in Sec. 33 of the Merchant Marine (Jones) Act of June 5, 1920, 41 Stat. 938. Said Section 33, reading:

"Sec. 33. That section 20 of such Act of March 4, 1915, be, and is, amended to read as follows:

'Sec. 20. That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for dam-

> ages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representatives of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principle office is located.' "

The language relating to death is somewhat different to that relating to personal injuries, but the intention of Congress is clear, and the language is intended to, and it does, embrace "all statutes," relating to injuries, and "all statutes" regulating the right of action for death, and puts seamen engaged in interstate commerce, exactly where railway employees engaged in the same interstate commerce stand.

If that had not been the intention, and Congress had not concluded that Section 6 applied, there would have been no occasion for the following language:

> "Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principle office is located."

As that would have been covered by Section 51 of the Judicial Code, which reads:

> "Except as provided in the five succeeding sections, no person shall be arrested in one district for trial in another, in any civil action before a district court; and, except as provided in the six

> succeeding sections, *no civil suit* shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant." * * *

There is nothing in any of the six succeeding sections that covers the case of personal injuries to seamen. And it is clear, that if Congress had not thought that the whole of Section 6 aforesaid applied, and particularly the following language therein;

> "or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action,"

it would not have modified that language by adding the above as to jurisdiction over actions under Section 33. The mere fact that it so modified it, shows clearly it intended the rest to stand as being carried into the said Merchant Marine (Jones) Act.

We find in said Section 33:

> "All statutes of the United States * * * shall apply."

Necessarily, all statutes, means the whole of every part of every statute, not parts or pieces of a statute. The word used is *"all"*.

The intervening language reading:

> "modifying or extending the common-law right or remedy in cases of personal injury to railway employees," * * *

were clearly used by Congress as words of indentification to identify the "All statutes of the United States" which "shall apply" and not as words of limitation to limit the application of all or any of the provisions of the Federal Employers Liability Act.

And nowhere in the section can we find any language that said that any state statute, limitation, or other, can apply.

To eliminate said Section 6 from Section 33 of the Jones Act, would violate one of the cardinal rules of statutory construction, namely, that every word of a statute must be given effect if possible and the statute as a whole be interpreted according to the intent of the statute makers.

The elimination of said Section 6, would make non-effective, the words

> "all statutes of the United States * * * shall apply,"

and give exclusive effect to the words,

> "modifying or extending the common-law right or remedy."

We submit, that the clear intention of Congress was to place seamen under the provisions of "certain all statutes of the United States." That was its policy. Place seamen where railway employees are placed, and then for the purpose of identifying the statutes it had in mind, it used the language

> "modifying or extending the common-law right or remedy."

The policy of the law cannot prevail over the letter of the law.

Fillinwider v. Southern Pac. Ry. Co., 248 U. S. 409.

We think this court has fully decided that the whole of the above Federal Employers Liability Act applies to seamen, in

Panama Ry. Co. v. Johnson, 264 U. S. 375,

in the following language:

p. 388:

> "On the contrary, it brings into that law new rules drawn from another system and extends to injured seamen a right to invoke, at their election, either the relief accorded by the old rules or that provided by the new rules.
>
> The election is between alternatives accorded by the maritime law as modified, and not between that law and some non-maritime system."

A state statute of limitation is a part of a non-maritime system.

p. 294:

> "The reference, as is readily understood, is to the Employers Liability Act of April 22, 1908, c. 149, 35 Stat. 65, and its amendments. This is a recognized mode of incorporating one statute or system of statutes into another, and serves to bring into the latter all that is fairly covered by the reference." (Citations.)

This court clearly states in that language, that the words,

> "modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply,"

were words of reference, referring to the statute that should apply and of course, being words of reference they cannot be used as words of limitation, as some of the courts hold.

p. 392:

"The national legislation respecting injuries to railway employees engaged in interstate commerce which it adopts has a uniform operation, and neither is nor can be deflected therefrom by local statutes or local views of common law rules (cases cited). Of course that legislation will have a like operation as part of this statute."

The Supreme Court of California, violated that language by applying a local statute to this case.

The Edward, decided Dec. 8, 1924; 45 Sup. Court Rep. 114-115:

"The wholesale adoption of the law for railroads above mentioned must be taken as an adoption of principles not as a basis for meticulous discovery of conflict with an established system in matter of detail."

Washington v. Dawson & Co., 264 U. S. 219:

p. 224:

"Equally well established is the rule that state statutes may not contravene an applicable act of Congress or affect the general maritime law beyond certain limits.

And plainly, we think, no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations.

* * * * * * *

The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the States and with foreign countries would be seriously hampered and impeded."

p. 225:

> "The definite object of the grant was to commit direct control to the Federal Government; to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation; and to establish, so far as practicable, harmonious and uniform rules applicable throughout every part of the Union."

p. 228:

> "Congress has prescribed the liability of interstate carriers by railroad for damages to employees (Act April 22, 1908, c. 149, 35 Stat. 65), and thereby abrogated conflicting rules. New York Central R. R. Co. v. Winfield, 244 U. S. 147.
>
> * * * * * * *
>
> The confusion and difficulty, if vessels were compelled to comply with local statutes at every port, are not difficult to see."

The confusion that would follow if each state applied its own statute of limitations can readily be seen. We now have federal courts applying the state statute of limitations to cases arising under said Section 33 of the Jones Act, and some apply said Section 6, as we will now show.

UNIFORMITY IS WHAT CONGRESS AND THE COURTS ALWAYS SEEK IN MARITIME MATTERS.

It is the law as established by this court, that state statutes of workmen's compensation are not applicable to maritime matters on account of lack of uniformity.

We have exactly the same state of facts with respect to statutes of limitations. On the Pacific Coast, vessels leave California and go to both Oregon and Washington. Almost all vessels do. The state statute of

limitations in California, is one year. In Oregon it is two years.

> Sec. 8, Oregon Code of Civil Procedure, Lord's Oregon Laws, 1910 Ed., Vol. 1:
>
> "Within two years:
>
> 1. An action for assault, battery, false imprisonment, for criminal conversation, or for any injury to the person or rights of another, not arising on contract, and not herein specially enumerated."
>
> * * * * * * *

The time in Washington is three years.

> Sec. 63, Washington Code of Civil Procedure, Pierce's Washington Code 1913, Supplement:
>
> "Within three years:
>
> 2. An action for taking, detaining or injuring personal property, including an action for the specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated."

We are unable to find any enumerations of personal injuries anywhere else in those codes.

Lack of uniformity is apparent to vessels engaged in the Pacific Coast trade, and it also is with respect to vessels plying from the Pacific Coast to New York, as the courts on this side of the continent apply state statutes, including the federal courts, and the federal courts in New York apply the limitation in Section 6.

Beer v. Clyde S. S. Co., 300 Fed. 561.

p. 563:

> "I can see no reason why the provisions in the Employers Liability Act preventing removal is not as fully incorporated in the Jones Act by reference as the provision that no action shall be

maintained unless commenced within two years, or the provision that the jurisdiction shall be concurrent with that of the courts of the several states."

Herrera v. Pan-American Petroleum-Trans. Co., 300 Fed. 563;

Martin v. U. S. Shipping Board E. F. C., 1 Fed. 2nd Series 603.

All those decisions were by Judge Hand, and he says in the *Beer* case that Judge Garvin of the same district in the case of *Malia v. Southern Pacific Co.*, 293 Fed. 902, had held that Section 6 of the Employers Liability Act was not incorporated in Section 33 of the Jones Act, that in effect, however, by holding that cases were removable, as Section 6 was not so incorporated. Subsequently, however, Judge Garvin held in

Stranza v. U. S. Shipping Board E. F. C., 3 Fed. Rep. 2nd Series, 845,

that Section 6 was incorporated, thus reversing his former decision.

So we now have the following, as we heretofore stated. Section 6 containing the two-years clause is held a part of Section 33 by reference on the East Coast of the United States, and on the West Coast it is held that it is not so incorporated.

Petterson v. Hobbs Wall & Co., 300 Fed. 811;

Wenzler v. Robins Line S. S. Co., 277 Fed. 812.

The *Wenzler* case is one of the first reported cases on Section 33 of the Jones Act, and therein his Honor Judge Cushman, held that the whole of the Employers Liability Act was not incorporated in said Section 33,

and that Section 6 was not. It seems on a reading of the decision that the reasoning is strained, technical, and is commented on by Judges Hand and Garvin in the cases above cited, and each has declined to further follow it.

The state courts in New York expressly declined to follow it from the first.

Tammis v. Panama Ry. Co., 202 App. Div. 227 N. Y.;

Lynott v. Great Lakes Transit Co., 202 App. Div. 619 N. Y.

Said Section 6 has therefore brought about the condition that on the East Coast of the United States it is held it applies to cases of personal injury to seamen, and on the West Coast it is held directly to the contrary.

That is not the uniformity that Congress sought when it passed the Jones Act, nor is it the certainty that the law delights in. Neither is the fact that vessels plying on the Pacific Coast are confronted with a one, two and three years statute of limitations. Section 6 of the Employers Liability Act, was made a part of the maritime law by the Jones Act. This is a maritime case, and this court said, that the maritime law could not be deflected from by local laws when passing upon this same law, and the Supreme Court of California, in this case said:

Engel v. Davenport, 194 Cal. 344, 349.

"In enforcing a liability falling within the admiralty and maritime jurisdiction, the state court was however, bound to apply the maritime law."

We submit it should have been applied in this case, and we respectfully refer the court to reasoning of Judge Hand and Judge Garvin in the cases above cited, as also the positive language of this court in the *Panama Ry. Co.* case, above quoted.

WHEN CONGRESS LEGISLATES ON A SUBJECT WITHIN ITS POWERS IT LEGLISLATES FOR ALL COURTS.

Mitchell v. Clark, 110 U. S. 633, 643:

"If Congress has a right to legislate on this subject, it has the right to make that legislation the law of all courts into which such a case may come, and we think they have done this in the statute under consideration."

Arnson v. Murphy, 109 U. S. 238, 243:

"It follows that in such cases, of which the present case is one, the limitation laws of the State in which the cause of action arose, or in which the suit was brought do not, under sec. 721 R. S., furnish the rule of decision and that it was, therefore, an error in the Circuit Court to apply, as a bar to the action, the limitation prescribed by the Statute of New York."

Atlantic Coast Line Ry. v. Burnette, 239 U. S. 199,

was a case under the same Employers Liability Act, and this court said:

p. 200:

"The second objection was met by deciding that the limitation of two years imposed by Sec. 6, could not be relied upon for want of a plea setting it up.

It would seem a miscarriage of justice if the plaintiff should recover upon a statute that did

not govern the case, in a suit that the same act declared too late to be maintained."

p. 201:

"In dealing with the enactments of a paramount authority, such as Congress is, within its sphere, over the States, we are not to be curious in nomenclature if Congress has made its will plain, nor allow substantive rights to be impaired under the name of procedure. Central Vermont Railway v. White, 238 U. S. 507, 511. But irrespective of the fact that the Act of Congress is paramount when a law relied on as a source of an obligation in tort, sets a limit to the existence of what it creates. Other jurisdictions naturally have been disinclined to press the obligation farther. Davis v. Mills, 194 U. S. 451, 454; The Harrisburg, 119 U. S. 199. There may be special reasons for regarding such obligations imposed upon railroads by the statutes of the United States as so limited. Phillips v. Grand Trunk Western Ry. Co., 236 U. S. 662, 667. At all events the act of Congress creates the only obligation that has existed since its enactment in a case like this, Whatever similar ones formerly may have been found under local law emenating from a different source. Einfree v. Northern Pacific Ry., 227 U. S. 296, 302. If it be available in a state court to found a right and the record shows a lapse of time after which the act says that no action shall be maintained, the action must fail in the courts of a State as in those of the United States."

Patrone v. Hewlett, Inc., 143 N. E. 232.

"But plaintiff did not have a remedy under the state act after the Jones Act occupied the field and became a part of the general maritime law."

Davis v. Mills, 194 U. S. 451, 454;

Vaught v. Virginia & S. W. Ry. Co., 132 Tenn. 679, 681;

Sandstrom v. P. S. S. Co., 260 Fed. 661;

El Paso & N. E. Ry. Co. v. Guiterris, 215 U. S. 87;

Mondou v. New York, etc. 2nd Employers Liability cases, 223 U. S. 1.

We respectfully submit, that Congress intended to, and it did, legislate upon every part of a case for damages for injuries when it passed Section 33 of the Jones Act, and that act supersedes all state laws, and that the Supreme Court of the State of California, was in error in applying the state statute of limitations to petitioner's case and we respectfully ask that this court so rule, and make its proper order accordingly.

Dated, San Francisco,
October 1, 1925.

Respectfully submitted,
H. W. HUTTON,
Attorney for Petitioner.